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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

NEKTOE DEMISON et al.,

Plaintiffs and Appellants,

v.

U.S. BANK NATIONAL ASSOCIATION, as
Trustee, etc.,

Defendants and Respondents.

F062022

(Super. Ct. No. CV-269821)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Sidney P.
Chapin, Judge.

Mark Alan Brifman, for Plaintiffs and Appellants.

S. Edward Slabach, for Defendants and Respondents.

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* Before Wiseman, Acting P.J., Kane, J. and Poochigian, J.

Nektoe and Danielle Demison (appellants) filed a complaint to quiet title naming as defendants U.S. Bank National Association, as Trustee for the C-Bass Mortgage Loan Asset-Backed Certificates, Series 2006-CB8; C-Bass Mortgage Loan Asset-Backed Certificates, Series 2006-CB8, a Trust; Old Republic Default Management Services, A Division of Old Republic National Title Insurance Company; and Does 1 through 500, inclusive (collectively respondents), after appellants defaulted on their real estate loan and nonjudicial foreclosure proceedings were executed. The complaint alleged that respondent Old Republic Default Management Services had no legal authority to initiate foreclosure proceedings. Respondent U.S. Bank National Association demurred to the complaint, claiming the complaint failed to state facts sufficient to rebut the validity of the non-judicial foreclosure sale and failed to plead that appellants tendered the total amount of the indebtedness at the time of the foreclosure. The trial court granted the demurrer, without leave to amend, and the instant appeal followed. We conclude the trial court did not abuse its discretion in sustaining the demurrer without leave to amend and affirm.

FACTUAL AND PROCEDURAL HISTORY

On July 18, 2006, Ownit Mortgage Solutions, Inc. (Lender), loaned appellants \$316,000 to finance the purchase of real property.¹ In exchange, appellants executed and delivered to Lender a promissory note in the amount of \$316,000, and a deed of trust. The deed of trust identified Ownit Mortgage Solutions, Inc., as the lender; Ticor Title, as trustee; and Mortgage Electronic Registration Systems Inc. (MERS), as “a separate corporation that is acting solely as a nominee for Lender and Lender’s successors and

¹ The facts are taken from the complaint and from the documents judicially noticed by the court.

assigns” and “the beneficiary under this Security Instrument.”² The deed of trust further provided:

“‘Successor in Interest of Borrower’ means any party that has taken title to the Property, whether or not that party has assumed Borrower’s obligations under the Note and/or this Security Instrument.” Under the subtitle “TRANSFER OF RIGHTS IN THE PROPERTY,” the deed of trust provided, “The beneficiary of this Security Instrument is MERS (solely as nominee for Lender and Lender’s successors and assigns) and the successors and assigns of MERS.” Finally, the deed of trust provided, “Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender’s successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.”

On February 11, 2009, LandAmerica, One Stop, Inc., acting as an agent for MERS, filed a notice of default and election to sell under deed of trust in the Kern County Recorder’s Office. According to the notice of default, appellants owed

² As explained in *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1151 (*Gomes*): “The role of MERS is central to the issues in this appeal. As case law explains, ‘MERS is a private corporation that administers the MERS System, a national electronic registry that tracks the transfer of ownership interests and servicing rights in mortgage loans. Through the MERS System, MERS becomes the mortgagee of record for participating members through assignment of the members’ interests to MERS. MERS is listed as the grantee in the official records maintained at county register of deeds offices. The lenders retain the promissory notes, as well as the servicing rights to the mortgages. The lenders can then sell these interests to investors without having to record the transaction in the public record. MERS is compensated for its services through fees charged to participating MERS members.’ [Citation.] ‘A side effect of the MERS system is that a transfer of an interest in a mortgage loan between two MERS members is unknown to those outside the MERS system.’ [Citation.] ”

\$9,974.31, as of February 10, 2009. On May 26, 2009, Old Republic Default Management Services, a Division of Old Republic National Title Insurance Company, as Trustee (Trustee), recorded a notice of trustee's sale notifying appellants that the property would be sold at a public sale unless they took action to protect the property. On February 23, 2010, Trustee recorded a trustee's deed upon sale granting to U.S. Bank National Association, as Trustee for the C-Bass Mortgage Loan Asset-Backed Certificates, Series 2006-CB8, title to the property.

On March 15, 2010, appellants filed a complaint to quiet title claiming that Trustee "did not have the right, power, or authority to conduct such sale, and any actions taken by it in that regard are void." The complaint provides: "Pursuant to the terms of the Note and the Deed of Trust, the Lender (or its successors or assigns) is the only party to the NOTE that can declare it in default. The NOTE has not been declared in default by the Lender, the only secured party. The Deed of Trust states that it secures 'to Lender: (1) the repayment of the Loan' The Lender is OWNIT MORTGAGE SOLUTIONS, INC., NOT anyone else. There is no other secured party. The notice of default which served as the basis for such sale stated that Plaintiffs were in default of obligations owed to a company called Mortgage Electronic Registration Systems, Inc. - a company that is not a Defendant herein, and a company to whom Plaintiffs owed no obligations to at all and thus could not have been in default."

Respondent U.S. Bank National Association, as Trustee for the C-Bass Mortgage Loan Asset-Backed Certificates, Series 2006-CB8, demurred to the complaint claiming appellants' complaint failed to allege facts sufficient to rebut the presumption of a valid sale and failed to allege a tender of the total amount of indebtedness owed at the time of foreclosure. Appellants, relying on two out-of-state cases, *Landmark Nat'l Bank v. Kesler* (2009) 216 P.3d 158, 168 and *Mortgage Elec. Registration Sys. v. Southwest Homes of Ark.* (2009) 301 S.W.3d 1, asserted that regardless of the language in the deed

of trust, MERS is not the beneficiary under the deed of trust and that only the Lender may declare a default.

DISCUSSION

““On appeal from an order of dismissal after an order sustaining a demurrer, our standard of review is de novo, i.e., we exercise our independent judgment about whether the complaint states a cause of action as a matter of law. [Citation.]”” (*Los Altos El Granada Investors v. City of Capitola* (2006) 139 Cal.App.4th 629, 650.) “A judgment of dismissal after a demurrer that has been sustained without leave to amend will be affirmed if proper on any grounds stated in the demurrer, whether or not the court acted on that ground.” (*Carman v. Alvord* (1982) 31 Cal.3d 318, 324.) In reviewing the complaint, “we must assume the truth of all facts properly pleaded by the plaintiffs, as well as those that are judicially noticeable.” (*Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 814.) “If the court sustained the demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. [Citation.] If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. [Citation.] The plaintiff has the burden of proving that an amendment would cure the defect. [Citation.]” (*Schifando v. City of Los Angeles* (2003) 31 Cal.4th 1074, 1081.) “In addition to the complaint’s allegations, we consider matters that must or may be judicially noticed. [Citations.] We also consider the complaint’s exhibits. [Citations.] Under the doctrine of truthful pleading, the courts ‘will not close their eyes to situations where a complaint contains allegations of fact inconsistent with attached documents, or allegations contrary to facts which are judicially noticed.’ [Citation.] ‘False allegations of fact, inconsistent with annexed documentary exhibits [citation] or contrary to facts judicially noticed [citation], may be disregarded....’ [Citations.]” (*Hoffman v. Smithwoods RV Park, LLC* (2009) 179 Cal.App.4th 390, 400.)

Appellants claim that the demurrer should not have been sustained without leave to amend since they pled the elements of a quiet title claim, as set forth in Code of Civil Procedure section 761.020 (except for a technical remedy that could be easily remedied), to wit: a description of the property, title of the plaintiff and the basis for that title, the adverse claims to the plaintiff's title, the date as of which the determination is sought, and a prayer for the determination of plaintiff's title against the adverse claims.

Respondent claims that the demurrer was properly sustained in light of the legal effect of the deed of trust, the notice of default, the notice of trustee's sale, the trustee's deed upon sale, and in light of appellants' failure to tender their unpaid balance.

The deed of trust expressly granted MERS, a beneficiary and nominee of the lender, the power to foreclose on the property in the event of appellants' default. There is nothing in the record to indicate the sale was not executed in accordance with the controlling documents. (See *Gomes, supra*, 192 Cal.App.4th at p. 1149.)³

Appellants challenge the validity of the sale claiming that Ownit (Lender) is still the owner and holder of the note secured by the deed of trust. Since the promissory note was never transferred or assigned and foreclosure under the power of sale in a deed of trust is enforcement of the note, only Lender, or a transferee, had the right to initiate foreclosure proceedings.

The question of whether the assignment of a deed of trust is legally effective without actual transfer of the corresponding promissory note was recently addressed by

³ In *Gomes*, the deed of trust, as in the instant case, provided that the borrower agreed that MERS held only legal title to the interest granted by the borrower, but as nominee of Lender had the right to foreclose. Gomes defaulted on his loan and MERS caused its agent to send Gomes a notice of default. (*Gomes, supra*, 192 Cal.App.4th at p. 1151.) Gomes filed a lawsuit naming MERS as a defendant and MERS demurred. The trial court sustained the demurrer without leave to amend and Gomes appealed. (*Id.* at p. 1150.) The Fourth District Court of Appeal affirmed, finding that MERS had the authority to initiate foreclosure proceedings because the deed of trust explicitly authorized it to do so. (*Id.* at p. 1157.)

the Sixth District Court of Appeal in the case of *Debrunner v. Deutsche Bank National Trust Co.* (2012) 204 Cal.App.4th 433 (*Debrunner*).

In *Debrunner*, plaintiff and appellant, Debrunner, along with his co-investors (collectively Investors) extended a \$675,000 loan in March 2006 to Barbara Chiu and Shimin Xu, secured by a second deed of trust on a home. Chiu executed a promissory note and second deed of trust in favor of Investors. At that time Chiu was already a trustor on the first deed of trust on the property, having borrowed \$975,000 from Quick Loan Funding, Inc. (Quick Loan), in June 2004. The trustee on that deed of trust was Chicago Title Company. The following month Quick Loan assigned the deed of trust, and Chiu's promissory note, to Option One Mortgage Corporation (Option One). Option One shortly thereafter assigned the deed of trust and the note to FV-1, Inc. On September 2, 2008, FV-1 assigned the deed of trust to Deutsche Bank, with respondent Saxon Mortgage Services, Inc. (Saxon) acting as "Attorney in Fact." The deed of trust was recorded on January 5, 2010. (*Debrunner, supra*, 204 Cal.App.4th at p. 436.)

In January 2008, Investors filed a notice of default. They scheduled a trustee's sale for the following month. Foreclosure was delayed due to the bankruptcy filing by Chiu's business entity. Following the bankruptcy court's granting of relief from the stay, Investors foreclosed and obtained a trustee's deed upon sale for the property. In August 2008, however, well before the sale was completed, Saxon, servicer on the first-position loan, filed a notice of default on the property. Notice was rescinded due to the bankruptcy proceedings. In July 2009, Deutsche Bank moved for relief from the bankruptcy stay in order to file a new notice of default. That motion was taken off calendar when the bankruptcy matter was closed in August 2009. On September 15, 2009, the foreclosure trustee, Old Republic Default Management Services (Old Republic), recorded a new notice of default on the property. In the accompanying Fair Debt Collections Practices Act notice, Old Republic named Deutsche Bank as the creditor and Saxon as its "attorney-in-fact," and informed the debtor that payment to stop

the foreclosure could be made to Saxon. On January 5, 2010, the county recorded a “Substitution of Trustee” from Chicago Title Company to Old Republic. This document had been signed and notarized by Saxon, on behalf of Deutsche Bank, on September 2, 2008. (*Debrunner, supra*, 204 Cal.App.4th at pp. 436-437.)

Debrunner commenced an action in November 2009 to stop the impending foreclosure by Deutsche Bank, claiming Deutsche Bank had no right to foreclose because Deutsche Bank did not have physical possession of, or ownership rights to, the original promissory note. Debrunner sought to quiet title to the property and remove the first deed of trust in favor of Quick Loan. (*Debrunner, supra*, 204 Cal.App.4th at p. 437.)

Deutsche Bank and Saxon demurred claiming that possession of the original note was not required under the applicable statutes, Civil Code section 2924 et. seq.⁴ Debrunner responded that any assignment of the deed of trust was immaterial “because a deed of trust ‘cannot be transferred independently’ of the promissory note, which must be ‘properly assigned’ and attached.” (*Debrunner, supra*, 204 Cal.App.4th at p. 437.) In so claiming, Debrunner relied on several sections of the Uniform Commercial Code pertaining to negotiation, transfer, indorsement, and enforcement of negotiable instruments. (*Ibid.*)

The Sixth District Court of Appeal rejected Debrunner’s challenge to the sustaining of respondent’s demurrer without prejudice reasoning as follows:

“As the parties recognize, many federal courts have rejected this position, applying California law. All have noted that the procedures to be followed in a nonjudicial foreclosure are governed by [Civil Code] sections

⁴ Civil Code section 2924, subdivision (a)(1) provides a “trustee, mortgagee or beneficiary, or any of their authorized agents” has the authority to conduct the foreclosure process; under Civil Code section 2924b, subdivision (b)(4), a “person authorized to record the notice of default or the notice of sale” includes “an agent for the mortgagee or beneficiary, an agent of the named trustee, any person designated in an executed substitution of trustee, or an agent of that substituted trustee.”

2924 through 2924k, which do not require that the note be in the possession of the party initiating the foreclosure. [Citations.] We likewise see nothing in the applicable statutes that precludes foreclosure when the foreclosing party does not possess the original promissory note. They set forth ‘a comprehensive framework for the regulation of a nonjudicial foreclosure sale pursuant to a power of sale contained in a deed of trust. The purposes of this comprehensive scheme are threefold: (1) to provide the creditor/beneficiary with a quick, inexpensive and efficient remedy against a defaulting debtor/trustor; (2) to protect the debtor/trustor from wrongful loss of the property; and (3) to ensure that a properly conducted sale is final between the parties and conclusive as to a bona fide purchaser.’ [Citation.] Notably, section 2924, subdivision (a)(1), permits a notice of default to be filed by the ‘trustee, mortgagee, or beneficiary, or any of their authorized agents.’ The provision does not mandate physical possession of the underlying promissory note in order for this initiation of foreclosure to be valid.

“Plaintiff’s reliance on the California Uniform Commercial Code provisions pertaining to negotiable instruments is misplaced. ‘The comprehensive statutory framework established [in sections 2924 to 2924k] to govern nonjudicial foreclosure sales is intended to be exhaustive.’ [Moeller v. Lien [(1994)] 25 Cal.App.4th [822,] 834; see also *I.E. Associates v. Safeco Title Ins. Co.* (1985) 39 Cal.3d 281, 285 [‘These provisions cover every aspect of exercise of the power of sale contained in a deed of trust’].] ‘Because of the exhaustive nature of this scheme, California appellate courts have refused to read any additional requirements into the non-judicial foreclosure statute.’ [Lane v. Vitek Real Estate Industries Group (E.D.Cal. 2010) 713 F.Supp.2d 1092, 1098; accord, *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1154–1157 [no statutory right to sue to determine authority of a lender’s nominee to initiate foreclosure; and in any event, plaintiff agreed in deed of trust that nominee had such authority].] ‘There is no stated requirement in California’s non-judicial foreclosure scheme that requires a beneficial interest in the Note to foreclose. Rather, the statute broadly allows a trustee, mortgagee, beneficiary, or any of their agents to initiate non-judicial foreclosure. Accordingly, the statute does not require a beneficial interest in both the Note and the Deed of Trust to commence a non-judicial foreclosure sale.’ [Citation.]” (*Debrunner, supra*, 204 Cal.App.4th at pp. 440-441.)⁵

⁵ Several federal decisions, applying California law, have held that no party needs to physically possess the original promissory note in order to foreclose validly. (*Clark v. Countrywide Home Loans, Inc.* (E.D.Cal.2010) 732 F.Supp.2d 1038, 1043;

MERS had a beneficial interest in the deed of trust. The fact that MERS did not have a beneficial interest in the note is not determinative.

Moreover, appellants cannot state a cause of action for quiet title because they did not tender the amount of the secured indebtedness or adequately state an excuse from tendering. (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 104 [“Because the action is in equity, a defaulted borrower who seeks to set aside a trustee’s sale is required to do equity before the court will exercise its equitable powers.” *Id.* at p. 112].) Appellants’ attempt to state an excuse from tendering based on the claim they did not owe money to MERS is unconvincing. MERS had standing to foreclose as the nominee for the Lender and beneficiary under the deed of trust. It logically follows that the necessity of tender is applicable.

DISPOSITION

Judgment is affirmed. The parties to bear their own costs.

Nool v. Homeq Servicing (E.D.Cal.2009) 653 F.Supp.2d 1047, 1053; *Jensen v. Quality Loan Service Corp.* (E.D.Cal.2010) 702 F.Supp.2d 1183, 1189.) *Nool, supra*, 653 F.Supp.2d at p. 1053 notes that Civil Code section 2924 broadly allows a trustee, mortgagee, beneficiary, or any of their agents to initiate nonjudicial foreclosure. Accordingly, the statute does not require a beneficial interest in both the note and the deed of trust to commence a nonjudicial foreclosure sale. (*Ibid.*; *Lane v. Vitek Real Estate Indust. Group* (E.D.Cal.2010) 713 F.Supp.2d 1092, 1099; but see *Domarad v. Fisher & Burke, Inc.* (1969) 270 Cal.App.2d 543, 553 [“[A] deed of trust has no assignable quality independent of the debt, it may not be assigned or transferred apart from the debt, and an attempt to assign the deed of trust without a transfer of the debt is without effect. [Citations.]”].)